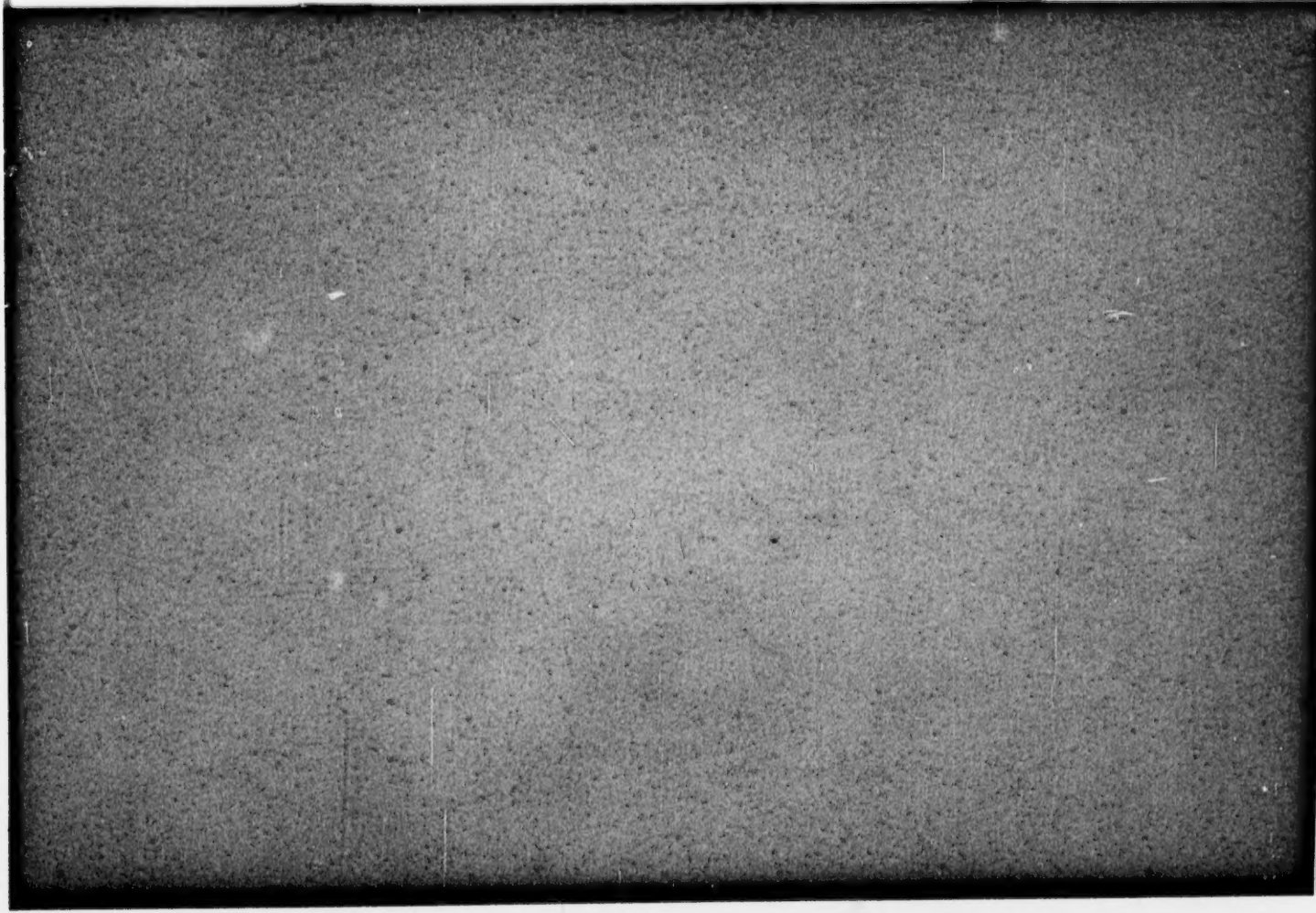


LIBRARY
SUPREME COURT, U. S.
FILED
JUL 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1900

NORRIS B. TWILLEY, ET AL.,
*Petitioners,*

v.

GOVERNOR OF THE STATE OF MARYLAND,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General
of Maryland,
GEORGE A. NILSON,
Assistant Attorney General
of Maryland,
K. DONALD PROCTOR,
Assistant Attorney General
of Maryland,
One South Calvert Building,
Baltimore, Maryland 21202,
For Respondent.

The Daily Record Co., Baltimore, Md. 21202

## Table of Contents


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 2 |
| Argument: | |
| I. The Legislative Districting Plan for State Legislative Districts 35 and 36 as Adopted by the Court of Appeals of Maryland does not "Disenfranchise" those Residents of Wicomico County Included in District 35 | 4 |
| II. The Proviso of the Maryland Legislative Districting Plan that in Districts Such as District 36 no County shall have more than one Delegate Residing in it in no way Affects the Equality of Representation Otherwise Embodied in the Plan | 5 |
| Conclusion | 7 |


## Table of Citations

*Cases*


| | |
|---|---|
| Dusch v. Davis, 387 U.S. 112 (1967) | 6 |
| Fortson v. Dorsey, 379 U.S. 433 (1965) | 6 |
| Mahan v. Howell, 410 U.S. 315 (1973) | 4, 5 |
| Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970) | 7 |

*Statutes and Rules*

PAGE

Annotated Code of Maryland:
Article 33—
Section 4A-1 to 4A-3 (1971 Replacement Volume and 1973 Supplement) ..... 7

Maryland Constitution:
Article III—
Section 2 ..... 2
Section 3 ..... 2, 6
Section 4 ..... 2
Section 5 ..... 2, 3

United States Code:
Title 28—
Section 1257 (3) ..... 1

APPENDIX

Constitution of Maryland:
Article III—
Sections 1 through 5 ..... 1a

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1900

NORRIS B. TWILLEY, ET AL.,

*Petitioners,*

v.

GOVERNOR OF THE STATE OF MARYLAND,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION

### OPINION BELOW

The Order of the Court of Appeals of Maryland dated March 22, 1974, is printed in Appendix A of the Petition and is reported at 271 Md. 320. This being an original proceeding in that Court, there are no further opinions or orders.

### JURISDICTION

The Order of the Court of Appeals of Maryland was entered on March 22, 1974. Within ninety days thereafter, Petitioners filed with Court a Petition for Writ of Certiorari to the Court of Appeals of Maryland pursuant to 28 U.S.C., §1257 (3).

## QUESTIONS PRESENTED

1. Whether the legislative districting plan for State Legislative Districts 35 and 36 adopted by the Court of Appeals of Maryland "disenfranchises" those residents of Wicomico County included in District 35, where substantial equality population exists between all districts in the State?

2. Whether the proviso of the Maryland legislative districting plan that in districts such as District 36 no county shall have more than one delegate residing in it affects equality of representation where that proviso constitutes only a basis of residence of delegates, and is not a basis for voting or representation?

## STATUTES INVOLVED

Maryland Constitution, Article III, Sections 1 through 5 are printed in Appendix A of this Brief in Opposition. The Legislative Districting Plan for the State of Maryland as promulgated and adopted by the Court of Appeals of Maryland is printed in Appendix A of the Petition. Section 1 of the Fourteenth Amendment to the Constitution of the United States is printed at pages 7a-8a of Appendix C of the Petition.

## STATEMENT OF THE CASE

Petitioners are registered voters in Wicomico County, Maryland who in September, 1973 intervened in an original proceeding in the Court of Appeals of Maryland seeking to have the entirety of their County included within one state legislative district.

The Legislative Districting plan which Petitioners sought to attack had been proposed by the Governor of Maryland pursuant to Article III, Section 5 of the Constitution of Maryland and became law on February 24, 1973. That plan, in accordance with Sections 2, 3 and 4 of Article III of the

Maryland Constitution, divided the State into 47 legislative districts for the election of the members of the General Assembly of Maryland, each such district being of substantially equal population[1] and each such district to contain one Senator and three Delegates. That plan placed 5,918 residents of Wicomico County in one legislative district (District 35) and the remaining 48,318 residents of Wicomico County in another legislative district (District 36).

On July 31, 1973, the Court of Appeals of Maryland, in an original proceeding theretofore instituted before it pursuant to Section 5 of Article III of the Maryland Constitution, invalidated the so-called Governor's Plan finding that notice of "public hearings" called for by Section 5 of Article III was deficient and that the Governor's plan therefore had not been validly promulgated and adopted. The Court, however, further ordered that it was adopting the Governor's Plan as the legislative districting plan for the State "unless cause to the contrary be shown," and provided that registered voters desiring to show such cause to the contrary should formally intervene in the proceedings.

Petitioners thereupon filed their Petition to Intervene with the Court of Appeals alleging that Legislative District 35 as constituted in the Governor's Plan, containing *inter alia* 5,918 residents of Wicomico County, violated the Maryland Constitutional requirements that districts be compact, consist of adjoining territory and give due regard to natural boundaries and the boundaries of political subdivisions. It was further claimed that the inclusion of the 5,918 residents of Wicomico County in District 35 "effectively disenfranchise[d] the registered voters therein," apparently from the remaining 48,318 residents of Wicomico County who had been included in District 36.

---

[1] It was never contended below by anyone that the districts of the Governor's Plan were of other than substantially equal population.

Petitioners contended that all of these defects could be cured by a plan proposed by them which placed all of Wicomico County in District 36.

The Court of Appeals rejected both the Governor's Plan and Petitioners' suggested plan, apparently choosing instead to follow the suggestions of intervening voters of Somerset County which had also been "split" by the Governor's plan between Districts 35 and 36 and placed all of Somerset County in District 36.[2]

## ARGUMENT

### I.

### THE LEGISLATIVE DISTRICTING PLAN FOR STATE LEGISLATIVE DISTRICTS 35 AND 36 AS ADOPTED BY THE COURT OF APPEALS OF MARYLAND DOES NOT "DISENFRANCHISE" THOSE RESIDENTS OF WICOMICO COUNTY INCLUDED IN DISTRICT 35.

Petitioners argue that the districting in question is violative of their rights to equal protection of the laws and due process of law. They, however, apparently concede, as well they must, that the Plan of the Court of Appeals of Maryland affords each district substantial equality of population. Indeed, as they also concede (Petition at page 5) the plan for which they contend would produce greater population disparity than the plan adopted by the Court.

Petitioners' reliance on *Mahan v. Howell*, 410 U.S. 315 (1973) is misplaced. There a three-judge District Court ruled the Virginia reapportionment plan unconstitutional because it deviated from population equality in order to establish dis-

[2] The Special Master appointed by the Court had proposed a plan for Districts 35 and 36 which placed *inter alia* all of Somerset County in District 35 and *inter alia* all of Wicomico County in District 36. The Attorney General of Maryland argued that that proposal violated the Maryland Constitutional provision that Districts consist of "adjoining territory." Compare description of District 35 of the "Hammond Plan" at Petition at page 5 with map printed in Appendix D to the Petition at 11a.

tricts conforming to political subdivision boundaries. This Court reversed, holding that the deviations therein involved (approximately 16%) were within tolerable limits where those deviations resulted from the State's rational objective of preserving the integrity of political subdivision lines.

Here, on the other hand, the Court of Appeals of Maryland was not acting to cure federal constitutional defects arising from lack of population equality, such allegations never having been made in this case. Likewise, there is no indication by the Court that it believed that the population deviations in its plan reached the limits of the equal protection clause.

As such, Petitioners argument resolves itself to a claim that the federal Constitution and *Mahan require* (rather than *permit*) that population deviations be stretched to their constitutional limits in order to accomplish subdivision representation. Such a contention, of course, requires no response.

Finally, it is submitted that the Maryland Constitutional requirement that districts consist of "adjoining territory" forms an adequate and independent state ground for the rejection by the Court of Appeals of the Plan argued for by Petitioners. See footnote 2, *supra*.

## II.

**THE PROVISO OF THE MARYLAND LEGISLATIVE DISTRICTING PLAN THAT IN DISTRICTS SUCH AS DISTRICT 36 NO COUNTY SHALL HAVE MORE THAN ONE DELEGATE RESIDING IN IT IN NO WAY AFFECTS THE EQUALITY OF REPRESENTATION OTHERWISE EMBODIED IN THE PLAN.**

Petitioners' argument in this regard proceeds on the entirely fallacious assumption that a Delegate from a multi-county district represents only the residents of his county.

The provision in question is that:

> "In any legislative district which contains more than two counties or parts of more than two counties, *and*

> *where Delegates are to be elected at large by the voters of the entire district*, no county, or part of a county shall have more than one Delegate residing in it." (Emphasis added.)

As applied to District 36 which consists of all of Worcester County, most of the population of Wicomico County, and all of Somerset County, this means that of the three Delegates to be elected from that District, *each of whom is to be elected at large by the voters of the entire district*, one shall reside in each County.[3]

It is thus clear that this Court's language and holding in *Dusch v. Davis*, 387 U.S. 112, 115 (1967), quoting *Fortson v. Dorsey*, 379 U.S. 433, 438 (1965) is directly applicable here:

> "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the District's senator."

The sole purpose of the provision in question is to give some assurance that each county in the State will have one of its residents serving as a Delegate in the State Legislature who will be sensitive to matters relating to that County's local legislation.[4]

At the same time, however, in the language of *Dusch v. Davis, supra*, such a Delegate's tenure depends on the district-wide electorate, and he must be vigilant to serve the

---

[3] In addition, the entire District elects one member of the State Senate. See Maryland Constitution, Article III, Section 3.

[4] Ironically, Wicomico County is the only Eastern Shore County with the power to pass its own local legislation.

interests of all the people in the district and not merely those of his home County. Clearly, this represents no "invidious discrimination" and no federal question is presented.[5]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General
of Maryland,
GEORGE A. NILSON,
Assistant Attorney General
of Maryland,
K. DONALD PROCTOR,
Assistant Attorney General
of Maryland,
For Respondent.

---

[5] It is to be added that the availability of *any* relief to Petitioners at this juncture is at the very least highly questionable, even if it is assumed that a federal question is presented herein (which there clearly is not). Compare *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970) (Opinion by Haynsworth, C.J.). Those candidates seeking nomination as Senators or Delegates in the 1974 General Election were required to file therefor on or before July 1, 1974. See Maryland Annotated Code, Article 33, Sections 4A-1 to 4A-3 (1971 Replacement Volume & 1973 Supp.). The offices sought by such candidates are, of course, defined by the districting which Petitioners seek to bring into issue herein.

# APPENDIX A

## CONSTITUTION OF MARYLAND, ARTICLE III

Section 1. Legislature to consist of two branches; to be styled General Assembly.

The Legislature shall consist of two distinct branches; a Senate, and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2. Membership of Senate and House of Delegates.

The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates.

Section 3. Division of State into Legislative districts; number of Senators and Delegates from each district; subdivision of districts.

The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district.

Section 4. Requirements for districts.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the president of the Senate and Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the third year following the 1970 census, and in the second year following every census thereafter, and the Governor may call a special session for the presentation of his plan prior to the regular session. The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after the opening of the regular session of the General Assembly in the third year following the 1970 census and in the second year following every census thereafter, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the third year following the 1970 census and in the second year following every census thereafter, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

Upon the adoption by the qualified voters of the State in 1972 of the above amendments to Sections 2, 3, 4 and 5 of this Article, any legislative districting and apportionment plan submitted by the Governor or adopted by the General Assembly pursuant to the provisions of this section as they existed immediately prior to the adoption in 1972 of the said amendments, shall be void and of no effect provided that any plan adopted by the General Assembly prior to the first day of the regular session of 1973 in conformity with Sections 2, 3, 4 and 5 of this Article, as amended in 1972, shall not be

void, but shall become law immediately upon the adoption of the amendment. The adoption of these amendments in 1972 does not affect the election, tenure, powers, privileges, and duties of any member of the General Assembly in office when these amendments become effective, for the remainder of the term for which he was elected.